

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JAJAH, INC.,

Plaintiff,

v.

STANACARD, LLC,

Defendant.

AND RELATED CROSS-ACTION

Case No.: C 09-0580 JW (PVT)

**ORDER RE PARTIES' PROPOSED FORM OF
PROTECTIVE ORDER**

On October 21, 2009, the parties filed a Joint Stipulation and [Proposed] Protective Order. As drafted, the proposed form of order is not acceptable to the court.¹ Based on the form of order submitted,

IT IS HEREBY ORDERED that no later than January 8, 2010, the parties shall submit a revised form of order that tracks the language of the court's model form of protective order, with the

¹ Among other things, the proposed form of order: 1) does not limit protection to information that warrants protection under Federal Rules of Civil Procedure 26(c); 2) purports to allow a party to designate testimony at a court hearing "Confidential" without order of the judge presiding at the hearing; 3) in effect provides only an "Attorneys' Eyes Only" level of protection; 4) imposes an overly broad patent prosecution ban; 5) fails to require the parties to comply with Civil Local Rule 79-5 when seeking to file designated documents; and 6) does not impose an appropriate duty to avoid inadvertent disclosure of privileged information.

1 following modifications:

- 2 1.) The parties may include in the protective order the procedures set forth in Paragraph 3
3 of their proposed form of order regarding the handling of computer source code,
4 provided that the provision must make clear that only such source code that warrants
5 protection under Federal Rules of Civil Procedure 26(c) is covered; and
- 6 2.) The parties may include a provision to govern the inadvertent disclosure of privileged
7 or work product information that reads as follows:

8 “Each party shall make efforts that are ‘reasonably designed’ to protect
9 its privileged materials. *See Gomez v. Vernon*, 255 F.3d 1118, 1131-32 (9th
10 Cir. 2001). What constitutes efforts that are reasonably designed to protect
11 privileged materials depends on the circumstances; the law does not require
12 ‘strenuous or Herculean efforts,’ just ‘reasonable efforts.’ *See, e.g., Hynix*
13 *Semiconductor, Inc. v. Rambus, Inc.* 2008 WL 350641, *1–*2 (ND Cal., Feb.
14 2, 2008); *see also*, FED.R.CIV.PRO. 26(f)(3) advisory committee’s notes to
15 2006 amendments (discussing the substantial costs and delays that can result
16 from attempts to avoid waiving privilege, particularly when discovery of
17 electronic information is involved). When a particular Rule 34 request
18 requires a production or inspection that is too voluminous, expedited or
19 complex (such as certain electronic productions) to allow for an adequate pre-
20 production review, the parties may enter into non-waiver agreements for that
21 particular production. If the requesting party is unwilling to enter into such an
22 agreement, the Producing Party may move the court for a non-waiver order.

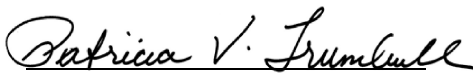
23 “In the event that, despite reasonable efforts, a Producing Party
24 discovers it has inadvertently produced privileged materials, then within 30
25 calendar days the Producing party shall notify the Receiving Party that the
26 document(s) or materials should have been withheld on grounds of privilege.
27 After the Receiving Party receives this notice from the Producing Party under
28 this paragraph, the Receiving Party shall not disclose or release the
inadvertently produced material to any person or entity pending resolution of
the Producing Party’s claim of privilege. The parties shall hold a meet and
confer, as defined in Civil Local Rule 1-5(n), as soon as reasonably possible
after a notice of inadvertent production. If the Producing Party and Receiving
Party agree that the inadvertently produced material is privileged, and was
disclosed despite efforts by the Producing Party that were ‘reasonably
designed’ to protect the materials, then the Receiving Party shall return or
certify the destruction of all copies (including summaries) of such material. If
no agreement is reached, then within 10 court days after the meet and confer,
the Producing Party must seek a ruling from this court to establish that the
material is privileged and that the Producing Party did not waive the privilege
by inadvertently producing the material. If the Producing Party seeks such a
ruling, the Receiving Party shall not disclose or release the inadvertently
produced material to any person or entity pending the court’s ruling on the
Producing Party’s motion.”

IT IS FURTHER ORDERED that, pending entry of the final form of protective order, the
court’s model form of protective order, as modified herein, shall govern the handling of confidential
information exchanged or disclosed during discovery in this case.

IT IS FURTHER ORDERED that, in the event the parties want any other modifications to

1 the court's model form of protective order, they shall file a joint statement setting forth the reason(s)
2 for the requested modification(s).

3 Dated: 12/18/09

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5 PATRICIA V. TRUMBULL
6 United States Magistrate Judge
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